SOUTH CENTRE

TAX COOPERATION POLICY BRIEF

https://taxinitiative.southcentre.int No. 25 • 30 September 2022

UN Model Tax Convention: Selective Territoriality – The Specter of Privileged Player in a Rigged Game *

By Muhammad Ashfaq Ahmed **

Abstract

This paper lays out the chessboard on which taxes on international incomes from immovables are contested, bargained, and harvested as per pre-determined rules that are starkly tilted in favor of developed countries. This embedded and pronounced bias in the international taxes regime in favor of developed countries makes them a privileged player. The developed countries then make maneuvers to optimize on their economic gains at the expense of developing nations rendering it a rigged game setting. The paper derives its rationale from an exceptionally selective choice of territoriality on incomes from immovables, which was astonishingly not aligned with the expected reverse capital movement, that is, from developing to developed countries. The genesis and evolution of selective territoriality are traced through its various institutional development phases – League of Nations (LN), Organisation for Economic Co-operation and Development (OECD), and United Nations (UN). An overwhelming international consensus on selective territoriality on incomes from immovables notwithstanding, the UN's role is brought into spotlight to argue that the developing countries may have suffered massively over the past one hundred years by instinctively believing in the UN Model Tax Convention's (MTC) efficacy and blindly pursuing Article 6 in their bilateral double taxation conventions (DTCs). The inimical implications of herd-mentality on part of developing countries got galvanized in the particular wake of developed countries employing innovative optimization tools – citizenship/residence by investment programs, tax havenry, manipulable ownership structures, beneficial ownership legislations, and porous exchange of information regime – to maximize on the economic gains. The paper undertakes both normative and structuralist evaluation of selective territoriality to sum up that this is an unjust principle of distribution of fiscal rights at the international level particularly in asymmetric economic relationships, and can hold its ground only until developing countries attain full cognition of the reality and start raising their vocal chords in unison to dismantle it.

***

Cet article offre un panorama du cadre mis en place à l'échelle internationale dans lequel sont menées les discussions et négociations, selon des règles prédéterminées qui penchent nettement en faveur des pays développés, concernant le prélèvement des taxes sur les revenus immobiliers. Ce biais avéré et prononcé du régime fiscal international en faveur des pays développés fait de ces derniers des acteurs privilégiés, qui n'hésitent pas à user de manœuvres, au détriment des pays en développement, pour tirer le maximum de bénéfices sur le plan économique, et ainsi fausser les règles du jeu. Il revient sur le choix particulièrement discriminant qui a été fait de soumettre les revenus des biens immobiliers au principe de territorialité alors même que, selon les prévisions, les mouvements de capitaux seront orientés majoritairement des pays en développement vers les pays développés, et non pas l'inverse. Il se propose, pour mieux le comprendre, de retracer la genèse et l'évolution du principe de territorialité au travers de ses différentes phases de développement institutionnel, de la Société des Nations (SDN) aux Nations Unies, en passant par l'Organisation de coopération et de développement économiques (OCDE). En dépit d'un vaste consensus à l'échelle internationale en ce qui concerne l'imposition des revenus immobiliers, les Nations unies ont adopté une position pour le moins contestable vis-à-vis des pays en développement, qui ont eu la naïveté de croire à l'efficacité du modèle de convention fiscale proposé par l'organisation et le tort d'inclure, tous et de manière aveugle, l'article 6 dans leurs conventions bilatérales de double imposition. Les conséquences négatives liées à ce comportement grégaire ont été accentuées par le recours dans les pays développés à des outils d'optimisation innovants consistant notamment en des programmes de citoyenneté ou de résidence par l'investissement, la création de havres fiscaux et de structures de propriété complexes, l'adoption de législations sur la propriété effective et de mécanismes perméables d'échange d'informations, qui ont pour seul objectif de leur permettre d'engranger le maximum de bénéfices sur le plan économique. L'article entreprend une évaluation à la fois normative et structurelle du principe de territorialité, dont il établit, au final, qu'il constitue un principe injuste de répartition des droits fiscaux au

* This paper was originally published in the Manchester Journal of International Economic Law, Volume 18, Issue 3 (2021), pp. 298-326. See https://www.electronicpublications.org/stuff/859.

** Muhammad Ashfaq Ahmed is a Pakistan IRS officer, and is currently posted as Chairman, Federal Board of Revenue, Islamabad. He holds a PhD in political economy. The usual disclaimer applies.

niveau international, en particulier dans l'hypothèse de relations économiques asymétriques et qu'il ne vaut qu'en raison de l'absence d'une véritable prise de conscience de la part des pays en développement et de voix s'élevant à l'unisson pour demander son abolition.

***

En este documento se expone el tablero de ajedrez sobre el que se impugnan, negocian y recaudan los impuestos sobre los ingresos internacionales procedentes de bienes inmuebles con arreglo a normas predeterminadas que están claramente inclinadas a favor de los países desarrollados. Este sesgo integrado y destacado en el régimen tributario internacional en favor de los países desarrollados les otorga privilegios. Por otro lado, los países desarrollados efectúan maniobras para optimizar sus beneficios económicos a costa de las naciones en desarrollo, con lo que termina siendo un contexto de juego amañado. El documento extrae su razón de una elección de la territorialidad excepcionalmente selectiva con respecto a los ingresos procedentes de bienes inmuebles, que —sorprendentemente— no estaba en consonancia con la circulación de capital en sentido inverso que estaba previsto, esto es, de los países en desarrollo a los países desarrollados. La génesis y la evolución de la territorialidad selectiva se rastrean a través de sus diversas fases de desarrollo institucional: la Sociedad de las Naciones (SN), la Organización para la Cooperación y el Desarrollo Económicos (OCDE) y las Naciones Unidas (ONU). Pese a un abrumador consenso internacional sobre la territorialidad selectiva con respecto a los ingresos procedentes de bienes inmuebles, se pone en el foco de atención el papel de la ONU para sostener que los países en desarrollo pueden haber sufrido inmensamente durante los últimos cien años por creer instintivamente en la eficacia del Modelo de Convenio Tributario de las Naciones Unidas y perseguir ciegamente el artículo 6 en sus convenios bilaterales para evitar la doble imposición. Las consecuencias perjudiciales de la mentalidad de rebaño para una parte de los países en desarrollo estuvieron motivadas concretamente por el hecho de que los países desarrollados empezaron a emplear innovadoras herramientas de optimización —ciudadanía/residencia mediante programas de inversiones, paraísos fiscales, estructuras de propiedad manipulables, legislaciones en materia de la propiedad efectiva y regímenes porosos de intercambio de información— para maximizar los beneficios económicos. En el documento se lleva a cabo una evaluación tanto normativa como estructuralista de la territorialidad selectiva para resumir que se trata de un principio injusto de distribución de derechos fiscales a nivel internacional, especialmente en relaciones económicas asimétricas, que solo podrá resistir hasta que los países en desarrollo logren el pleno conocimiento de la realidad y comiencen a alzar sus voces al unísono para eliminarla.

"Every year billions of dollars are siphoned off by corrupt developing world politicians to tax havens and invested in expensive properties in western metropolises. The delta between rich and poor countries is expanding due to the fact that money laundering is not treated at par with drug money or terror financing."[1]

- Imran Khan

Section 1: Introduction

The United Nations (UN) Model Tax Convention (MTC) vide Article 6 allocates taxing rights on income from immovable property to the State in which the income generating property is situated.[2] In international tax lexicon, this is dubbed as territoriality, the source rule or the *situs* principle. Territoriality, theoretically speaking, is the default position of all international taxation under which all states enjoy unfettered authority to tax all incomes arising within their geographical borders. This principle has ruled the roost throughout history, with only a few exceptions. The UN MTC's position on immovable property, from this angle, ought to be taken as normal, logical, and equitable – a fair framework of inter-nation distribution of fiscal rights. However, when seen at slightly deeper level, the equitability assumption might turn out to be sham and shallow on a couple of significant counts.

One, while the UN MTC preserves territoriality on immovable property, it rigs the same on other categories of international incomes – practically rendering it a scenario of selective territoriality. Taxation of industrial or business profits, as well as professional services, for instance, is assigned to the residence state unless derived through a permanent establishment (PE) or a fixed base situated in the source state. The taxing rights on profits of shipping and air transport business are allocated to the state in which the place of effective management of the enterprise is located. Likewise, dividends, royalties, interest incomes and directors' fees are, per se, taxable in the residence state. Taxation of income from employment, and the performance of artists and sportsmen have been vested in the state in which the employment or performance takes place.[3] Governmental remunerations are assigned to the payer's state for taxation purposes. The residual incomes are vested to be taxed by the residence state of the recipient. This contrast parsimoniously helps illuminate the oblique bluntness in the pattern of allocation of taxing rights under the UN MTC, warranting a deeper appraisal.[4]

Two, the way in which territoriality in asymmetric bilateral arrangements between developed and developing countries has operated over the past century has turned out with fiscal fallouts that are unilaterally favorable to the stronger partners in the economic relationship. It is premised that the principle underlying UN MTC Article 6 has instrumentally contributed towards the sustained and surreptitious siphoning off of exorbitant amounts of capital from developing to developed countries, its investment in the latter's immovables market and its resultant taxation thereon on rentals, capital gains, and reinvestments. It is contended that the UN MTC's meek acquiescence to the source rule, in isolation and exception to the allocative principles on other types of international incomes, is not sans purpose and design. The coercive implication of the premise gets galvanized by the UN MTC's avowed and aggressive posturing that since it is a model for negotiations "between developed and developing countries," it must necessarily be favorable to the developing countries. Thus, it is not astonishing that the entire tally of double taxation conventions (DTCs) that developing countries have signed over the past one hundred years, purportedly modeled on the UN MTC, are based on the principle of territoriality on immovable property.

This situation gives rise to a paradox. The paradox emanates from the fact that the UN MTC is not only meant to serve as a template for negotiations between developed and developing countries, but also to promote, champion, and protect fiscal rights of developing countries vis-à-vis developed ones. This position is in sharp contrast to the Organisation for Economic Co-operation and Development (OECD) MTC, which admittedly looks to promote fiscal interests of developed countries.[5] The paradox between the UN MTC's stated position as a protector of developing country rights, and a simultaneous meek acceptance of the source state's unbridled taxing rights on immovable property, may have resulted in substantial fiscal fallouts for developing countries – not so far conceptualized and analyzed with clarity and in a systematic fashion. It is posited that by accepting source taxation on immovable property in isolation, in the wake of massive capital flight from the developing to the developed countries, the UN MTC has not done any good to the cause of the former – an extant international consensus on the matter notwithstanding. The UN MTC, in fact, blundered by accepting source taxation rights on immovable property on behalf of the developing nations, as it cost these countries dearly not only on account of large sums of investible capital siphoned off from their economies and parked in real estates of developed nations, but also on account of liquidation of their hard-earned scant foreign exchange. Moreover, the selective territoriality deprived developing countries of potential revenues on the rental streams and capital gains.

Taking the developing country as the unit of analysis, the paper inevitably inducts international political economy into the appraisal toolkit.[6] In the international system states interact amongst themselves at bilateral and multilateral levels – apparently on an equal footing – to legitimately promote their political and economic interests. In reality, however, states behave much more surreptitiously and selfishly, exploiting total diplomatic power to promote their economic interests without having regard to moral compunctions. This paper's analysis is undertaken by dividing all countries into two groups – developed and developing. The groups of states interact not only at state-to-state level, but also at multiple other levels – with multinational corporations (MNCs), non-governmental organizations (NGOs), intergovernmental organizations (IGOs) and multilateral institutional frameworks, such as the UN, the International Monetary Fund (IMF), and World Bank.

The international taxes system created under the auspices of the League of Nations (LN) and then adopted by the UN could be interpreted differently by different academic and intellectual schools of thought. Liberals would promote it as a shot in the arm of international co-operation, leading to and resulting in all that globalization stands for and implies. A constructivist would equate it with a system of capitalist interaction in which concepts are developed, meanings are created, and norms are generated to facilitate real world transactions. Marxists would bring in the economic argument, suggesting that the system only advances the international economic status quo, resulting in ever-growing economic inequality at whatever and whosoever's cost.[7] Neo-Marxists would prop the instrumentalist perspective to point out the state capture of developed western economies by the capitalist resulting in a muffled internationalization of capitalism under the garb of international taxes.[8] The realist, on the other hand, would argue that the system reflects naked power politics in the international fiscal domain in its brute and raw form. This paper is geared to lay bare various dimensions of the UN MTC, selective territoriality on immovable property, its implications for the developing countries and alternatives for the future, essentially from an underlying realist perspective.

The paper consists of five sections. After Section 1 has framed the issue and triggered the debate, Section 2 unravels the international consensus on the vesting of taxing rights on immovables to the source state under various MTCs, and traces its roots in history from the League of Nations' (LN) early years to its latest manifestation, reflected in the UN MTC 2017, the OECD MTC 2017, and the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). Section 3 takes stock of the fallouts of adoption of Article 6 by developing countries in their double taxation conventions (DTCs) from various angles. Section 4 appraises selective territoriality by undertaking a normative evaluation from various angles. The paper concludes in Section 5 with a glum commentary on the efficacy of the UN MTC to serve its avowed objectives, and its ramifications for developing countries, particularly if the extant international compact on taxation of immovables is left unaltered for any further length of time.

Section 2 :Selective Territoriality – Historical Context

2.1. International Consensus

The selective territoriality on UN MTC Article 6, in fact, does not come in isolation; it resonates a wider international consensus on the matter, cutting across temporal and spatial divides. The OECD MTC Article 6 falls on all fours of the UN MTC Article 6, with practically few variations. The US MTC Article 6 may be slightly divergent in formulation, but essentially it is in *pari materia* with the UN MTC's allocative principle. Likewise, the Andean Community (AC) MTC, despite varying from the UN MTC on a few fundamental counts, converges with its principle of taxation on immovable property by stipulating that, "Income of any kind from immovable property shall be taxable only by the Member Country in which such property is situated."[9] The international consensus on source rule on immovable property does not confine itself to the incomes covered under Article 6; it extends to capital gains on disposal of real property, too. In fact, the UN MTC asserts source rule not only to capital gains derived from direct disposal of immovable property,[10] but also to gains derived from indirect disposal, e.g., through share capital of a company.[11] This widens the scope of the situs rule to practically any income or gains derived directly or indirectly from immovable property. The OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI) only reinforces this dispensation.[12] While the OECD MTC and US MTC are coterminous with the UN MTC on this count, the AC MTC lends convergence only to the extent of direct disposal of capital assets.[13] In fact, "neither the OECD Model nor the U.N. Model indicates whether tax should be imposed on gross or net income."[14] However, the UN's stated position on the matter is that "the taxation of income…should have as its appropriate objective the taxation of profits rather than gross income."[15] Strangely, to Whittaker, it "appears to be a concession to developed countries which believe that expenses should be offset in taxing such income."[16] This is the fullest and widest possible convergence that could be achieved on a principle of international taxation, and its practical manifestation into the double taxation agreements (DTAs) actually signed is not only wide-spread geographically, it is also deep-rooted historically – virtually throwing up no exceptions to the rule. The fact of the matter is that "Article 6 of the…UN Model remains the most unchanged and stable part of the Models and bilateral tax treaties."[17]

The consensus on selective territoriality on immovables amongst the OECD member states and the US is quite explainable. The OECD MTC is admittedly geared to promote financial and fiscal interests of advanced economies. Likewise, the sole objective of the US MTC is to protect and promote economic interests of the US fisc by jealously guarding taxation rights on its real property. The AC MTC looks to forge and promote bilateral economic relationship between neighborly par economies at similar levels of development.[18] However, the UN MTC's professed position and responsibility to promote fiscal interests of the developing countries (as probably they could not do so on their own), and its brazen capitulation into surrendering residence taxation on immovable property, was nothing less than a grand failure with far-reaching implications for the developing countries. A brief survey of the evolution of the situs rule on immovable property through various phases of history would illuminate the ensuing debate as to its efficacy, implications, and legitimacy.

2.2. Pre-League of Nations Period

There is little evidence to suggest that prior to LN's systematic work on international taxes any principle of taxation of immovable property other than the unfettered territoriality was in vogue in any manner. In 1914, Neumeyer drawing upon one of Jacobus Perizonious's manuscript dating back to twelfth century Bologna, which *inter alia*, dealt with the issue of taxation of immovable property located in Bologna and Ferrara owned by foreigners, confidently promoted the proposition that the situs rule was the prevailing principle of international taxation during the Middle Ages.[19] Reimer believes that the allocation of taxing rights to the situs state may be as primitive as bilateral or multilateral tax agreements.[20] Vinnitskiy avers that everybody "seems to agree that income from immovable property in a state is taxable there."[21] Thus, it is reasonable to presume that during the pre-LN period situs rule applied across the board to the taxation of income from immovable property owned by non-residents.

2.3. League of Nations

The League of Nations (LN) was established as a result of the Paris Peace Conference, on January 10, 1920.[22/23] The LN's purpose, as per its Covenant, was "to promote international co-operation and to achieve international peace and security."[24] Although the Covenant primarily consecrated itself to the restoration of peace and the prevention of war, it also aimed to ensure "equitable treatment for the commerce of all Members of the League."[25] In February 1918, the League's Council resolved to "convene an international conference to analyze the financial crisis and suggest means of remedying and mitigating the dangerous consequences arising from it."[26] The International Financial Conference that convened at Brussels in late 1920, espoused unto itself, *inter alia*, international taxation, and professed to make progress on "an international understanding, which, while ensuring the due payment by everyone of his full share of taxation, would be facilitating placing of investments abroad."[27] This is how the LN got involved in international tax matters.

2.3.1. LN Report 1923

The outcomes of the Financial Conference led to the creation of two Provisional Committees: the Economic Committee and the Financial Committee. The Committees were given clear-cut task assignments[28], with international taxation going to the latter. The Financial Committee made the observation that the subject of international taxation "should be studied from the widest possible standpoint, and that expressions of opinion upon it should be obtained from recognized experts" and further that any "possibility of an international convention regulating the matter should be considered."[29] Thus, a Committee of four well-known fiscal economists was constituted to come up with a comprehensive report on the issue.[30] The Committee, in regard to the "immovables," after dilating upon four plausible factors of decision-making, that is, "acquisition or origin,"[31] "situs,"[32] "enforceability or legal status,"[33] and "domicile,"[34] re-emphasized the source rule but not quite. It was held that "inasmuch as the second and third elements in economic allegiance strongly reenforce the first (origin), domicile ought to play only a slight role as compared with origin."[35] The LN Report 1923, which essentially incorporated the Economists' work, went on to hold:

> Most countries, as a matter of fact, allow it to play no role at all. We should be disposed, however, to maintain that, as a matter of pure theory, the claim of domicile to at least a small share ought not to be overlooked. This conclusion, however, obviously applies more completely to a tax on the property itself, whether in the form of a real tax, a land tax, an inheritance tax or a capital levy. But it is true even to some extent of a pure income tax. If an absentee landowner plays, because of his large rent roll, a considerable part in his place of habitual residence or domicile, it does seem that the place of domicile should not be entirely denied a right to ask him for at least a slight support. But, at the very best, the proportion allotted to domicile would be exceedingly small.[36]

A year prior to the publication of LN Report 1923, Italy had already "proposed a conference of government officials to reach practical solutions on the more pressing double taxation issues."[37] The proposal ostensibly stemmed from the desire to appraise the issue at a more practical level. The Financial Committee went ahead with consulting three states that already had experience negotiating and finalizing double taxation treaties, and three more states,[38] which were likely to be interested in the matter.[39]

2.3.2. LN Report 1925

The LN Report 1925 differed with the LN Report 1923 on the principle of sharing of taxing rights on immovables, stating that, "the country of domicile alone is entitled to collect the general income-tax." However, "as an exception to this principle," it was laid down that "the country of origin may tax income accruing from immovable property, agricultural undertakings and industrial and commercial establishments, exclusive of dividends."[40] It is, therefore, clear that the territoriality on immovables was incorporated into the modern international tax framework a hundred years ago through the LN Report 1925. It may be added that while the experts retained territoriality on immovables, they made brave departures on other types of incomes. In an intra-developed world scenario, the exception would have probably faired neutrally. In a developed-developing country scenario its real impact would be felt—and the fact that all experts hailed from and represented developed industrialized countries (in their personal capacity though) only galvanized that grievance. Although empirically intractable, the exception, in its unidirectional outcomes, may have induced lopsidedness into the forward march of the world economic history over the past hundred years, and helped the developed world as a result of the reverse capital flows. The seeds of yet another concerted effort under the League's framework had been sown in LN Report 1925. It was prompted that "the League convene an expanded conference of government officials to develop draft international treaties."[41] The Financial Committee, accepting the proposal, moved to institute a Committee on Double Taxation and Tax Evasion[42] by enjoining upon it "to take into consideration the disadvantage of placing any obstacles in the way of the international circulation of capital, which is one of the conditions of public prosperity and world economic reconstruction."[43] The work on international taxes under the auspices of the Committee continued over the next couple of years.

2.3.3. LN MTC 1927

The Committee of Technical Experts on double taxation and tax evasion presented its report in April 1927, proposing four draft conventions with explanatory notes. It was the Draft Convention for the Prevention of Double Taxation that contained an allocation rule for income from immovable property. Article 2(1) of the Convention reads: "The income from immovable property, i.e. which corresponds to the actual or presumed rental value of such property, as well as any other income from such property which is not covered by Article 5, shall be taxable in the State in which the property in question is situated."[44] This particular principle was likewise to "apply to income from mortgage or other similar obligations."[45] Vinnitskiy argued that the provision "did not limit the scope of its application to cases where the taxpayer is a resident of a contracting state and immovable property is situated in the other contracting state," and wherefore it "could be applied to the situations where the income was derived from the immovable property situated in a third state."[46] He further contended that the particular provision gave the taxing right to the state in which the immovable property was situated "only if the income was not derived from industrial, commercial or agricultural undertaking through a permanent establishment."[47] However, if the income was derived from a PE, the taxing rights were vested in the state in which the PE was located. It is evident that in the LN MTC 1927, the situs rule was placed in a subaltern position to the PE principle, which was quite contrary to the modern dispensation on the issue.[48] The term "immovable property" was not defined, which "approach was based on the idea of the border (in the logical and economic sense) between income from immovable property and business income that was 'derived from industrial, commercial or agricultural undertakings,'" whereby the former was to "correspond to the actual or presumed rental value."[49] The Committee of Technical Experts was replaced by the Fiscal Committee in 1928 as LN's loose limb.

2.3.4. LN Report 1935

The Fiscal Committee deliberated upon the LN MTC at its various sessions held between 1928 and 1935. The Fiscal Committee's Plurilateral MTC 1931 mirror-imaged LN MTC 1927, except that the "business income shall not include…income from immovable property…income from mortgage, from public funds, bonds (including mortgage bonds)…"[50] Apart from Vinnitskiy positing that this brought "the distributive rule on income from immovable property closer to the current approach of the…UN Model,"[51] the LN Report 1935 did not substantially impact the lateral developments in the arena of international taxes.

2.3.5. LN MTC 1943

In spite of its overly pronounced pro-developing country leanings, the LN MTC 1943chose not to tinker with the situs rule enshrined in LN MTC 1927 by stating that "income from real property shall be taxable only in the State in which the property is situated."[52] The LN's position taken was quite understandable in view of the fact that the way the principle of situs was brought to prevail and the residence state did not receive any taxing rights on income from immovable property.[53] A few additional sub-categories of income from immovable property such as "income from mortgages," "royalties from immovable property or in respect of the operation of a mine, quarry, or other natural resource," and gains derived from the disposal of immovable property were closely identified and left to be regulated by Article 3, 10, and 12, respectively. But the principle underlying these incomes was essentially the situs rule. "In these circumstances, such a classification of incomes from immovable property had quite a limited meaning."[54] On the issue of interaction between income from business and income from immovable property, the scope of the former was excluded from the purview of Article 2 where income was "derived from exploration of lands, buildings, and sub-soil as a part of a business, including mining, forestry and agriculture."[55] Thus, the principle reflected in LN MTC 1927 was replicated, and the proposal of LN MTC 1935 was discarded.

2.3.6. LN MTC 1946

Immediately after World War II (WWII), the European capitalist powers scrambled to stock-take the developments that had taken place during the war period. The Fiscal Committee convened in London for its 10th session to develop the MTC 1946.[56] It was untenably observed that the structure of the MTC 1943 and MTC 1946 remained identical, aside from certain editorial modifications in the latter MTC, and that the only notable difference between the two was "relating to the taxation of interest, dividends, royalties, annuities and pensions."[57] The LN MTC 1946 was recast to bring back into saddle the pre-MTC 1943 regime.[58] When it comes to immovables, both the LN MTC 1943 and LN MTC 1946 converge. Article II of the LN MTC 1946 reads: "Income from real property shall be [59] Whittaker argues that the "uniformity of position is probably the result of a consistent view of in rem taxing jurisdiction by the developed countries, and a preference for source jurisdiction by the developing countries."[60] It is contended that Whittaker's attribution of the wide-going consensus on the source rule to "a preference…by the developing countries," is without any empirical basis. It may even be that developing countries are yet to attain true cognition of the inimical nature of the source rule and its complex interaction with the reverse capital flows.

2.4. Post-War Period

Soon after WWII was over, the Organization of European Economic Cooperation (OEEC)was created in 1948. The OEEC established a Fiscal Committee in March 1956, and tasked it with preparing a MTC with a concrete set of proposals to implement it.[61] Thus, where the UN baulked on its role in the fiscal domain, the OEEC rushed in to grab the opportunity. The OEEC work, fundamentally based on the LN MTC 1946, attempted to introduce the modern approach under which the situs principle prevailed on business income (taxation of immovable property rule should apply to immovable property of commercial, industrial or handicraft enterprises, etc.).[62] Likewise, it was unequivocally held that the ships and aircraft would not constitute immovable property under DTCs. The OEEC also rather inconsequentially tinkered with the definition of elements of immovable property by drawing distinction between "income derived from the direct use," "income from letting," and "alienation of immovable property," without, in fact, changing the underlying principle of taxation. It has been argued that the true heir of LN's extensive work on international taxation was OECD, and not UN, as is generally mistakenly believed.[63] Given the stakes involved, the capitalist world substantially invested in the OECD, and capacitated it enough to churn out dominant ideas which could capture almost the entire epistemological space in the international fiscal domain.

2.5. OECD MTC 1963

Upon the OEEC's transmutation into the OECD on September 30, 1961, the latter released on July 1, 1963 what later came to be known as the OECD MTC 1963. The OECD MTC 1963 reconfigured the provision on immovable property as Article 6 with a single important alteration in regard to clear-cut demarcation between income derived from immovable property itself and the gains derived from its disposal. It has been stipulated that since the OECD MTC Article 6 did not contain reference to the residence state, it potentially created a possibility of worldwide taxation by the source state of income derived from immovable property. This unintended aberration was corrected in the UN MTC 1981, which stipulated that the "property in question must be located in the state which is not the taxpayer's state of residence."[64] Resultantly, income derived by a resident of a contracting state from this state or a third state would fall under Article 21, but not Article 6, and anyway be subject to taxation under the domestic laws.

2.6. UN MTC

In 1967, the UN ended up creating an Ad-Hoc Group of Experts on Tax Treaties too.[65] The very nomenclature of the Group expressly containing a direct reference to "Tax Treaties between Developed and Developing Countries" betrays an underlying urge to rectify fiscal inequities in the international taxes regime extant between the UN member nations. The UN MTC 1981 – the first of its kind – was rolled out with much fanfare. Intriguingly, while the principle of territoriality was effectively rigged on business incomes (linking it to the PE), it was observed and reinforced on incomes from immovables. The UN MTC Article 6, in fact, resonated the international consensus that had evolved through the preceding half century and culminated in the OECD Model 1963 Article 6. The acquiescence appears to have been quite mechanical and sans deliberations – at least, any meaningful ones. The term "immovable property" was left to don the meaning that "it has under the law of the Contracting State in which the property in question is situated."[66] Nonetheless, the property that is accessory to the immovable property, "livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources," have, in any case, been included within the scope of the immovable property for the purposes of taxation in the source state. The UN MTC Article 6 reinforces the source state's right to tax incomes derived from immovable property's "direct use, letting or use in any other form."[67] The source state's right to tax also extends to the incomes from immovable property of an enterprise and to the incomes from immovable property used for the performance of independent personal services.[68] Likewise, ships and aircrafts have been specifically excluded from the tax nexus on immovable property in the source state – in fact, in either of the states.[69] Moreover, like a plain reading of the provision leads one to conclude, it "does not deal with income arising from immovable property situated in the taxpayer's state of residence, or in a third state."[70]

The UN MTC's naiveté does not end at routine incomes from immovable properties; it does extend to capital gains too. Similarly, incomes from immovable property that are attributable to a PE are treated as business profits, and liable to tax under the relevant rules. It has been averred that the "purpose of this provision is to ensure that the state of source has the right to tax any income from immovable property even if it is not attributable to a PE."[71] The UN MTC Article 13 "expands the right to tax of the state of source, in that it may tax gains from the alienation of interests in partnerships, trusts and estates which principally own immovable property situated therein," which essentially implies that "gains, in whatever form, from the immovable property situated in a Contracting State may be taxed in that State."[72] In the same vein, the "gains from the alienation of shares, other than those shares of principally immovable property owning companies, representing a participation" beyond a mutually agreed threshold "in a company which is a resident of a Contracting State may be taxed in that State."[73] At this particular point, the OECD MTC is at variance with the UN MTC as it does not contain a formal provision in this connection and leaves the contracting states to settle the matter through bilateral negotiations.[74] Lennard cites it as a rare instance where essentially a UN MTC provision travelled to the OECD MTC – a rarity in its own right.[75] The UN MTC went through some modifications in 1999, 2001, 2007, 2011, and 2017, but without ever touching the selective territoriality on incomes from immovable property. The UN MTC's consecration to source rule without aligning it with the movement of capital and associated fiscal implications were set to have fallout for the developing countries, and they did as explicated in the next section.

Section 3: Selective Territoriality – Optimization

In order for the allocation of taxing rights on international incomes from immovables to best reflect the interests of the developed countries, a two-tiered approach was adopted to lay out the requisite legal infrastructure. At the multilateral level, various MTCs, – particularly the UN MTC, were rolled out by way of a conceptual framework, which was voluntary in appearance, but compulsive in essence. At the bilateral level, the *Model* tax convention was raised to the mantle of a *Convention* – forging in the developing countries a condescending allegiance thereby obliquely steering them into signing UN MTC Article 6 in their bilateral DTCs rather recklessly; involuntarily. It is posited that taxing rights on UN MTC Article 6 were not aligned with the likely direction of capital flows as on other categories of incomes – business, interest, dividends, royalty, and even international traffic. This is simply because capital movement on real estate was anyway going to take a reverse direction, that is, from the developing to the developed countries. This is where the UN MTC failed in its avowed mission of protecting and promoting fiscal rights of developing countries. Thus, once the stage was set in terms of laying down of legal wherewithal, it was only logical that developed countries quickly moved to align their domestic policy frameworks to give traction to the reverse capital flows and optimize on the selective territoriality. A number of mechanisms were contrived and put in place with multiple objectives in view – incentivization of foreign investment into real property being one of them. The actual boon of luring investment in immovable property is that a country can acquire liquid capital from all over the world while retaining the real control over its real assets, that is, land and superstructures built over it being stationary within their territorial borders. It can also spur investment in the construction industry, related sub-industries, and support service sectors creating job opportunities for the domestic workforce, raise saving and investment rates, augment aggregate demand and lift peoples' incomes. The way selective territoriality was optimized by developed countries, and the way it impacted the developing countries, can be gauged from the select succeeding aspects.

3.1. Citizenship / Residence by Investment Programs

The foremost mode of optimization on the selective territoriality on immovables is the citizenship by investment (CBI) and residence by investment (RBI) programs that are offered by nation states, dependencies, and protectorates allowing foreign individuals to obtain citizenship or (temporary or permanent) residence rights in return for certain investment in their economies, in general, and to their real assets, in particular. The CBI and RBI programs, with overlapping features in many respects, are identical to each other in motives, design, operation, outcomes, and implications. However, there is also a marked difference in that while CBI programs bestow citizenship rights exhibiting in a passport or a national identity card, RBI programs accrue the host country residential status manifesting in a residence card, permit, or a certificate. Thus, while a CBI program may carry all features of an RBI program, the latter may be loaded with more direct, pronounced, and far-reaching implications for the target state tax systems; in fact, for the entire international taxes system and its integrity.[76]

Shorn of all additives, CBI/RBI programs are indicative of a fierce competition between nation states to lure high net worth individuals into their jurisdictions and reap fiscal fruits of their worldwide businesses, incomes, and wealth. Christians avers that the most enterprising and the wealthiest individuals could choose to live in a jurisdiction depending not only upon personal preferences, arithmetic of "multiple personal and social factors, but also a calculation of the costs and benefits of competing residence programs that offer tax incentives to immigrants."[77] This may also be the most perverse and predatory form of internationalization of capitalism. Rixen equates the propensity of jurisdictions towards "adopting their fiscal policies strategically, among which companies and individuals can choose, in order to attract new investment and poach other countries' tax base,"[78] with tax competition in rather a perverse form. The CBI/RBI programs are believed to produce "stockholder citizens"[79] in the sense that "investors have an instrumental interest in obtaining the citizenship"[80] of smaller states and havens as entry-pass to bigger economies contrary to "stakeholder citizens"[81] who are the product of proper naturalization of ordinary migrants, over time, becoming part and parcel of the host community.

Although since the Westphalian Treaty, 1648, the award or withdrawal of citizenship has been deemed to be an inalienable sovereign function of the state, the modern international legal infrastructure recognizes this position more explicitly. The Hague Convention Article 1 emphasizes that it is within each state's jurisdiction "to determine under its own law who are its nationals."[82] Beretta defines jurisdiction "as a series of rules that define a qualifying connection between a subject matter and a state, and … set of boundaries of a country's sovereignty."[83] He goes on to explicate that the "connection must…possess a certain degree of intensity, in the sense of entailing a 'genuine' or 'sufficient' link".[84] The tax law, like every field of law, has its own jurisdictional rules. It has been averred that "in relation to income tax, for a state to impose its taxing rights, a qualifying connection needs to exist either with the tax subject i.e. the person upon whom the obligation falls to pay, or with the tax object i.e. the cluster of facts from which an item of income derives."[85] The aggressive CBI/RBI programs are viruses that contravene and bug internationally accepted rules of jurisdiction of the target states by first sucking capital therefrom and then stripping them of the associated fruits.

The CBI/RBI programs could be classified into three broad categories. Firstly, the tax-loaded investment programs are, in fact, the most harmful. This implies that nation states sponsoring such programs "use their taxing power in some manner to attract immigration."[86] In this respect, the programs "that are potentially high-risk…are those that give a taxpayer access to a low personal income tax rate of less than 10% on offshore financial assets and do not require significant physical presence of at least 90 days in the jurisdiction."[87] Christians believes that, "Tax incentives for favored immigrants are but one aspect of this brave new world of tax competition."[88] It has been contended that in a world of increasing wealth inequality, coupled with an equally fierce competition, a regulatory deficit, "and a limited number of elite to target for immigration, it is a buyer's market for the geographically mobile consumer of fiscally convenient tax residency."[89] He goes on to explicate that tax planning may be accomplished "where one's nationality is relevant to the assignment of tax residency under a treaty."[90] Beretta avers that "citizenship if purposively acquired through an investment scheme, may represent the springboard for new nationals to obtain, directly or indirectly, a number of tax benefits (if not, 'tax privileges')".[91] He further stipulates that "for a person wishing to acquire…citizenship, the possibility of attaining a special tax regime constitutes an alluring incentive."[92] There is no doubt that "by levying no income tax or having no comprehensive personal income tax regime," a country's CBI/RBI programs become riskier,[93] particularly for the target state, which first bears its brunt of capital flight and then that of selective territoriality on immovables.

Secondly, the so-called tax-neutral CBI/RBI programs are geared to extend or avail advantage other than those relating to taxes.[94] The host-state motives behind such programs could be the avenues to set up a new business in the host jurisdiction, greater mobility due to visa-free travel, better education and job opportunities for the family or even the right to live in a country with political stability.[95] Arguably, tax-neutral programs are "explicitly designed to attract the wealthy to become permanent residents and taxpayers,"[96] and not for any immediate or short term tax benefits.[97] Some of the CBI/RBI programs could be "nothing more than a fast lane to visa status for those who can pay the premium."[98] It has been averred that for many countries "launching visa programs that favor citizenship acquisition by foreigners is a straightforward way of sustaining their budget needs and stimulating the economy, job creation and capital investment from abroad."[99] Such programs incentivize wealthy individuals "to migrate to, or at least work or study for some time in a different country," which can guarantee to them or their progeny an additional option to relocate in the future.[100] It is contended that even the most tax-neutral CBI/RBI programs would have implications for the target states under the selective territoriality.

Thirdly, the secrecy-driven CBI/RBI programs merely extend secrecy cover in return for all the dubious capital transmittals through surreptitious means. It is feared that

CBI/RBI programs can potentially be exploited to misrepresent an individual's jurisdiction of tax residence and to endanger the proper operation and integrity of the OECD's Common Reporting Standard (CRS) due diligence procedures.[101] Like already pointed out, CBI/RBI programs could interest various persons for multiple genuine reasons, but then there are CBI/RBI programs that are high-risk for certain identifiable reasons. These risks include relieving the new residents of "certain reporting requirements concerning foreign income for the entire duration of the special tax regime."[102] The CBI/RBI programs, it has been argued, "can also be used for the wrong reasons," for instance "to escape a legitimate prosecution in one country by fleeing to another one, to engage in money laundering or violate international sanctions, or … to avoid CRS reporting, … to hide from authorities money related to tax evasion, corruption or money laundering."[103]

The selective territoriality operates as a thick shelter to the host state because once funds get invested there, rental incomes, capital gains arising to individuals and trusts, and capital gains arising to land-rich corporations get taxed there, completely stripping the target state of its due tax share. Moreover, since immovables are currently not covered by the CRS framework, the investments made do not get reported in case of new nationals. It may not be out of place to mention that the inadequacy of citizenship as a test of an individual's fiscal obligations was underscored as early as the LN Report 1923, which reckoned citizenship as "fast breaking down in practice" and "clearly insufficient in theory."[104] Since there is an ever "growing number of countries that grant citizenship or long-term/permanent-resident status to people who only undertake a passive investment, such as…in real estate,"[105] it may be about time that the comity of nations sat down to decide upon the adequate level of the role of CBI/RBI programs in the international fiscal system.

3.2. Tax Havenry

The other mechanism which was contrived, promoted, and protected by developed countries to optimize on selective territoriality under UN MTC Article 6 and harvest reverse capital flight proceeds was the tax havenry. The "tax haven" implies a jurisdiction with low or no taxes, scant effective Exchange of Information (EOI), absence of transparency, and non-existent substantial activity requirements.[106] There is little doubt that once the international tax regime which was not based on any solid uniform principle – source rule or residence rule, but on cherry-picking, that is, selectively adopting the rule that suited the developed powers, had been rolled out, it was only a matter of time before such sophisticated mechanisms were developed to optimize on the rules adopted. The regulatory blind spots – euphemistically dubbed as tax havens, which brazenly sucked precious capital out of the developed countries' real estate markets, is one such super-sophisticated ploy. It is noteworthy that in the wake of UN MTC Article 6, sans being monocausal, tax havenry has consistently diffused and expanded over the past one hundred years: in 1974, there were only 15 recognized tax havens, which stood 73 in 2018.[107] While the total value of the capital stashed in tax havens is over US$ 21 trillion, a good part of it is parked in offshore immovables.

In fact, adverse implications of tax havenry manifest far and beyond UN MTC Article 6 – beyond even the realm of taxation.[108] It was stipulated that the very term "tax haven" is "a misnomer, because tax havens offer escape routes not just from taxes but potentially from any of the rules, laws, and responsibilities of other jurisdictions – whether those be taxes, criminal laws, disclosure rules, or financial regulations."[109] Thus, tax havens contribute towards a global regulatory deficit, in general, and fiscal and current account deficits in developing countries, in particular. It has been contended that tax havens help steal not only "stamp duty, inheritance tax and capital gains tax," but also "income tax if the properties are being let and are artificially loaded with debt to avoid payment."[110]

The selective territoriality on immovables may have a direct nexus – more in an operational than a causal sense – with the growth and perverse working of tax havens. A large number of companies and trusts based in tax havens are leveraged to purchase expensive properties in developed western countries. It was reported that properties worth £122 billion located in England and Wales were held through offshore companies based in tax havens under anonymized ownerships. This figure was more than all housing stock in Westminster and the City of London put together.[111] In connection with London's inflated and ballooned up real estate market, it was pertinently remarked that there "billionaires are pushed out by billionaires."[112] In the same vein, it has been averred:

> London belongs to investors who do not live in the city… On paper a mansion is owned by a shell company. At the moment there are in excess of 40,000 properties that are owned by anonymous offshore corporations meaning that we do not know who the owners are. It could be decent people; it could be mafias. A lot of money that came here and exploded the prices is of dirty origin… Trillion of Euros from Russians, Germans, Chinese, and Indians have poured into London. From a socio-economic perspective it is not sustainable. You cannot have a city where residents and workers cannot live.[113]

The question arises as to why the developing countries which signed UN MTC Article 6 in their bilateral DTCs could not align their domestic land ownership frameworks to attract foreign investment *a la* the developed countries., While the most powerful developed countries quickly and confidently moved to allow ownership rights to non-nationals and harvested massive chunks of capital into their real estates, developing countries failed in this pursuit. A few developing countries that jumped on to the bandwagon also recorded only a marginal success before being called and cautioned. In fact, the developing nations' failure to capitalize on the opportunity is ascribable to a xenophobic worldview stemming directly from their colonial heritage and overhang. It was not until the turn of the century that tax havenry came under the spotlight of major European and North American powers. Paradoxically, those very major powers happened to actually own, control, manage, and regulate the tax havens, and are their overlords.[114] It was posited that while recent initiatives may have, to a certain degree, compelled the tax havens to water down their operating banking secrecy regimes and engage in voluntary and request-based tax-information exchange, these changes were likely to have only a limited impact, because the tax authorities had to first fulfill a number of pre-conditions before being able to seek/receive and utilize the information.[115] The UN MTC, it has been argued, monopolized the entire epistemological space for the developing nations by eliminating the alternatives and the mental freedom to look for the alternatives.[116] At some level, tax havenry represents the ugly face of capitalism too.

3.3. Manipulable Ownership Structures

While investing in real property located in an offshore jurisdiction, the proprietary structure may be the single most critical variable in the investor's decision-making equation, particularly when it is with capital of dubious credentials that is remitted through irregular channels.[117] This is where complexity, layering, anonymization and the choice of ownership structure attain key importance. Over the past few decades, a number of complex ownership structures have been contrived in the developed world, each having potential to achieve unspecified objectives and ambiguous outputs – including optimization on the selective territoriality on immovables. A non-resident individual investor or group of investors could choose to invest in real property in an offshore jurisdiction under one or more of the following modes:

(i) Directly – as individual owner, co-owner, or partner;

(ii) Indirectly – via a purpose-built resident company or pre-existing resident company that may or may not have other investments;

(iii) Indirectly – via a non-resident company whose shares are owned either directly by the individual or through an interposed non-resident company;

(iv) Indirectly – via a company incorporated in a 3rd jurisdiction whose shares are owned directly by the non-resident or via yet another non-resident company; or

(v) Indirectly – via a testamentary or *inter vivos* trust.[118]

It has been argued that in case of *indirect* scenarios "the entity selected to make and own the investment may be a sole proprietor or member of a co-investment group, as a co-owner or a partner in a partnership."[119] The indirectization of real property ownership through interposed corporations and trusts – often in multiple layers – has been the single most facilitative factor in the bulk transfer of capital from the developing to the developed world. The capacity of developing country tax systems and other enforcement arms gets challenged while dealing with labyrinthine and complex ownership structures put in place with expensive and sophisticated legal and technical advice. This way developing countries not only lose precious capital, tax on the capital, but also tax on incomes from immovables acquired with stolen capital.

3.4. Beneficial Ownership Mechanisms

Similarly, acquisition of immovable property under beneficial ownership structures is yet another mechanism through which territoriality under UN MTC Article 6 is optimized and the reverse of movement of capital is given traction. Ownership of assets by both natural and juridical persons can be either legal or actual. In case the asset is registered in the name of the person who actually owns it, the matter ends there. However, if the asset is registered in the name of a person other than its actual owner, the scenario is dubbed as beneficial ownership. In legal parlance, the term "beneficial owner" implies a natural person who eventually owns an asset or controls a legal entity that, in turn, legally holds the asset. The concept also covers the person(s) who enjoy decisive and effective control over a legal person or its arrangement. The most obvious purpose of creating beneficial ownership arrangements is to delink the actual owner from the source of funds (which could be proceeds of crime or tax evasion) and its tax implications.[120] This is how the "global elite", which "is basically looking for a safe-deposit box,"[121] finds one in offshore anonymized real estates.

It is an established fact that the bulk of the transactions that take place in offshore estate markets are held under beneficial ownership arrangements, and it goes without saying that all such transactions have tax implications. Brown rightly posits that it is "critical to establish the identity of the beneficial owner of an asset in order to determine the tax result."[122] This can have tax impact vis-à-vis originally invested funds, the incomes being generated by the asset post acquisition, and the surplus produced at the time of its disposal and change of ownership. It was reported that approximately "two out of three of the 91,248 foreign-company owned properties in England and Wales are held via the British Virgin Islands and Channel Islands structures."[123] This is quite a staggering ratio. It is obvious that once the real owner is dissociated from an asset, taxation cannot be executed, at least, in the residence jurisdiction, by implication, the developing countries. Why developing nations, particularly? This is simply because major European and North American powers whose tax base is poached through beneficial ownership structures can effectively coerce the tax havens into providing all the critically important information required to see through the beneficial arrangements. It is the developing nations that are treated with disdain and dismissiveness by the tax havens – and, of course, at the behest of their ultimate overlord – the developed powers.

It is astonishing that though the use of the beneficial ownership tool with regard to immovables under Article 6 and the types of properties it covers is rampant, it has hardly ever made way into the debate on the matter. This is particularly because the maximum misuse of beneficial ownership is through trusts and interposed companies established in a third jurisdiction vis-à-vis properties purchased in developed countries with the funds siphoned off from developing countries. These kinds of complex ownership arrangements have fleeced developing countries for long – first through siphoning off of capital, and then by avoiding paying taxes on the rentals and gains generated. Lately, the international community's shift of focus to the beneficial ownership issue has started to make a difference, though only marginally. Pressure is being exerted on various jurisdictions to place information on beneficial ownership in the public domain and also allow it to be part of the request-based EOI framework with relative ease. However, due to relative recentness "of the novelties regulating the beneficial owner concept in the domestic legal order," its essential aspects in the international legal order are yet to be explored, and "waiting to be tested in practice."[124]

3.5. Porous EOI Regime

The extant international EOI regime exhibits strains and structurally-oriented undercurrents between developing and developed countries. The realist, pro-developed country bias in the international taxes cooperation framework is historically embedded. Jogaranjan, with reference to EOI under the LN MTCs, has pertinently remarked that "it was thought to be completely unacceptable that residence-countries would provide information regarding their residents to enable them to be taxed in another (the source) country."[125] At some level, these tensions continue to simmer in regard to immovable properties under all three EOI mechanisms – request-based, spontaneous, and automatic – exhibiting a built-in anti-developing country bias with particular reference to flight of capital and its parking in real assets located in developed countries – directly or indirectly through offshore tax havens. When it comes to request-based EOI, issues like foreseeable relevance, retroactivity, availability of information, and "taxpayers' notice" are brought in to slow down and, at times, even scuttle the exchange process. Likewise, when the information exchanged is sought to be used to have a crackdown on money laundering and other illegal funnels of flight of capital, the principle of "the purpose for which it was exchanged" is brought to the fore to frustrate the efforts to have a crackdown on the money launderers owning borderless and nationless capital. Spontaneous EOI has had a limited scope – particularly eversince it has been rendered to operate on reciprocal basis. Its efficacy is being tested in connection with RBI/CBI programs, despite OECD's advice to all states harboring such initiatives to share the particulars of their buyers enabling parent states to enforce laws. While OECD may be working on it, the countries sponsoring such programs are resisting sharing the EOI under the framework on various excuses.

Similar is the case with automatic EOI under the OECD's CRS framework as it does not cover immovables yet. In fact, CRS is further exacerbating the outcomes of territoriality under UN MTC Article 6 in that it may be encouraging conversion of liquidity into real estate to avoid reporting. Noked argues that possibly "some tax evaders emptied their offshore financial accounts before the start of AEOI by buying real estate or other non-financial assets."[126] He further apprehends that since "the direct ownership of non-financial assets, such as real property, precious metals, artwork, and collectibles, is not reported to foreign tax authorities under…CRS," some "tax evaders may invest in offshore non-financial assets."[127] It has been feared that many tax evaders may "have not been deterred or caught by AEOI because they shifted their undeclared offshore financial assets to other tax evasion channels that are not subject to AEOI."[128] Thus, while the selective territoriality under UN MTC Article 6 has per se implications of its own, it is optimized by the developed countries through the aforementioned mechanisms. Once in vogue with impunity, various not-so-advanced jurisdictions also got into competition to induce more and more investment in their real sectors by resorting to the aforementioned optimization ploys practically turning a blind eye to the appropriateness of the origin of the funds and the channels through which those were remitted. The oppressive implications of fiscal plunder of developing nations on account of optimization of selective territoriality, though empirically intractable, have been massive.

Section 4: Selective Territoriality – Appraisal

A wide-going skepticism in scholarly circles regarding legitimacy, fairness or even the very requirement of an MTC-based and DTC-sustained international tax system has been consistently growing over the past few decades.[129] This cynicism has, in fact, mostly been general in nature – not really channelizing itself into unbundling and critically analyzing the system, that is, its allocative principles being dissected in essential detail, genesis, evolution, operation and outcomes, and appraised on some normative principles. It follows that the legitimacy or validity of a principle of law can be analyzed in terms of its underlying canons of justice, equity, and fair play. Similarly, the efficacy of a principle of law can be gauged from its impact and outcomes for its potential affectees – individuals, groups, organizations and states. The selective territoriality on immovables under UN MTC Article 6, particularly from the point of view of developing nations can, *inter alia*, be appraised from these very perspectives.

4.1. Selective Territoriality – Defense

The UN MTC does not necessarily and explicitly commit itself as to why territoriality was exercised in the midst of its getting rigged on most remaining income types. In fact, a debate to align the principle of taxation on immovables with the likely direction of capital flows has never been undertaken – similarly to the rest of international incomes. The OECD MTC, however, does explain that taxation of income on immovables has been vested to the source state "due to the fact that there is always a very close economic connection between the source of this income and the State of source."[130] Khan is of the view that the "international consensus in this matter stems from the fact that there is always a very close economic connection between the source of this income and the state of source i.e. where the property is situated."[131] Reimer emphasizes that amongst all the distributive principles, the situs state has the "best right" to acquire the taxing rights because of its control over the real property.[132/133] Vinnitskiy asserts "that in case of Article 6 the territorial link between income and respective property was and remains highly important."[134] It is posited that the raison d'être advanced to support exercise of selective territoriality, that is, a close "economic connection" or "territorial link" would have been defendable if the property were purchased from the capital generated and incomes earned within the situs state's own economic boundaries, and not with capital of all shades and hues poached from the residence state – contextually, the developing nations. It has been contended that, "Real estate is a wonderful way to cleanse money," as once one "buys real estate, the derivation of the cash is forgotten,"[135] and that, "Real estate is a great alternative."[136] Astonishingly, while the developing countries continued to lose precious capital siphoned off from their economies, liquidating in the process heard-earned and, in fact, in many cases borrowed foreign exchange, as well as fiscal rights on the revenues being generated from the real assets created with the stolen capital, the entire debate at the international taxes intellectual theater remained focused on "determining where the property was located,"[137] "what constituted property," or even "what constituted income from immovable property."[138] This is an astounding trivialization of a superior principle of distribution of fiscal rights between nations in asymmetrical economic relations having far-reaching implications for the denizens of the developing countries; it can't have been sans a design or purpose.

4.2. Selective Territoriality – Evaluation

The defense of selective territoriality, as gleaned in the preceding part, can be appraised from structuralist, legalist, and normative perspectives.

4.2.1. Structuralist Evaluation

Contextually, the structuralist perspective implies that selective territoriality is the product of the structural composition and configuration of the international tax system, with all its merits and demerits in a realist sense. Vann cast doubts on the efficacy of the MTC-based system when he reckoned it as "the solution to international tax problems…whose time has come – and gone." He reaffirmed his position by stating that the MTC-based international tax system had almost become inefficient, irrelevant, and inflexible.[140] Avi-Yonah lent support to Vann's aggressive proposition by stating that the "current international tax regime is a flawed miracle."[141] Although Easson did not go to the extent of proposing its elimination, he did suggest that developing countries reduce their statutory rates on passive incomes unilaterally, that is, lower than the prevailing DTC rates "in order to attract investment, not to secure reciprocal treaty benefits."[142] He also could have gone on to suggest to the developed world to allow unilateral tax credit sans any DTCs, in which scenario, the capital would have headed to the jurisdictions offering maximum rate of return. However, Easson later did not dither away from suggesting that it might be the "time for a new approach" on the matter.[143] Wheeler averred that "there is a fundamental flaw in the way that the route to treaty protection is currently defined."[144] Wilkie, exploring into the relevance of DTC-sustained international tax system in the context of taxation of income from business, baulked from heralding its doom, as "it would be presumptuous."[145] The wide-going skepticism notwithstanding, there is no consensus as to how and what that new system should look like and operate. Now, if the entire international tax structure is being questioned for its validity, how can its one particular part – selective territoriality on immovables – be considered wholesome?

4.2.2. Legalist Evaluation

There is an ever-greater number of developing nations that are attaining cognition as to the actual working and impact of the MTC-based world tax system and its various sub-systems interacting in a variety of ways. The Kenyan High Court, in a historic judgement delivered in March 2019, struck down the Kenya-Mauritius DTC treating it, *inter alia*, inequitable. The petitioner, Alvin Mosioma, interpreting the court order, emphasized that the "judgement validates the call for African countries to review all their tax treaties particularly those signed with tax havens."[146] In the same vein, it was suggested "to rethink the costs, benefits and motivations around signing DTCs in the first place," and there might be a need to "set up a DTC policy framework – which sets out the basic minimums the country should consider while signing bilateral tax agreements."[147] There is also a growing number of studies questioning specific DTCs, a set of DTCs, or the DTC policy by a given country. In 2012, Pakistan unilaterally terminated its DTC with Greece as it offered excessive benefits to international shiplines.

4.2.3. Normative Evaluation

The selective territoriality and its potential fallouts for the developing countries can also be evaluated under the normative evaluative knowledge stream – axiology – the branch of philosophy, which deals with adequacy and propriety of human action. Axiology has two competing strands: firstly, deontology – that adjudicates upon moral validity of an action on the basis of its adherence to a principle, rule or duty; secondly, consequentialism – that implies that the morality of an action ought to be judged with reference to its consequences and outcomes. In this connection, Kamm's *Principle of Permissible Harm* can be inducted into the analysis, which stipulates that one may harm in order to save more if and only if the harm is an effect or an aspect of the greater good itself. Similarly, her *Doctrine of Productive Purity,* which provides a deontological prescription for delimiting the boundaries in which people could be allowed to act in a way that could harm others can be helpful.[148] Now under none of the doctrines the shift of capital from the developing to the developed countries, its stashing in the developed immovables markets, and then its taxation in respect of incomes and gains generating therefrom can be justified – in that neither the territoriality is deontological in nature as it is brazenly selective and deviates from the principle of fair play; and likewise, on the standard of consequentialism, it has both intrinsically and instrumentally caused economic injustice and disparity – great affluence for a few in the developed, and great poverty for a far larger number of people in the developing world.

4.3. UN's Role – Appraisal

It is quite clear now that the UN MTC has not achieved its avowed objectives. It did, however, achieve quite the opposite. Firstly, it helps strip developing countries of the revenues on the assets that are created with capital siphoned off from their economies and parked in the developed countries' immovables markets. Secondly, it encourages flight of capital from the developing countries, undermining their governance structures and economic stability. Thirdly, it incentivizes the retention of stolen capital abroad, perpetuating the economic harm. Fourthly, it creates balance of payment (BOP) problems for developing countries, destabilizing their external sectors and transforming them into eternal credit-client states.[149] Fifthly, it triggers brain-drain over the medium and short term in the target countries under the umbrella of CBI/RBI programs, whereby the most enterprising of the individuals are sucked out of developing and into developed countries. Sixthly, it undermines the efficacy of the international EOI regime by compromising its integrity by inducing visible blind spots. Seventhly, it leads to and results in inequities in the international economic order, with much of wealth accumulating in the developed countries, and poverty concentrating in the developing countries. The impact of these downsides of UN MTC's selective territoriality on Article 6 gets galvanized by the fact that all developing countries, without exception, signed in their DTCs the UN-prescribed provision. This is primarily due to the developing countries' blind belief in the UN MTC's fundamentally being beneficial and supportive to their cause. Since the developing countries are generally operating under serious capacity constraints, such an assumption becomes a convenient and complacent policy choice – sans due diligence and a rigorous cost-benefit analysis. It has been empirically established that while redefining the international tax system during the 2010s, "the OECD did only consult with developing countries after the major decisions were made, and failed to ask about preferences of developing countries beyond capacity building."[150] It was further observed that the "preferences of the surveyed developing countries consistently deviated from the OECD model in the preference of a truly, binding multilateral agreement, the waiving of reciprocity requirements for developing countries, sanctions for non-compliant financial institutions…, and for the inclusion of other types of assets, such as real estate."[151] Thus, how could the UN MTC, which essentially toes the line of the OECD, be expected to protect and promote the developing countries' taxing rights and fiscal interests?

It has been posited that the "UN's role has been thoroughly dubious as while unfunded mandates to ensure good governance, reduce poverty, improve health, increase literacy rates and ensure sustainable development of their peoples were assigned to developing countries, it practically turned a blind eye rather lent support to a sustained erosion of their own legitimate tax base."[152] It is in this context that a "close link between taxing powers and the ability of the state to fulfill its obligations to its citizens," is asserted, and therefore, states vociferously "articulate sovereignty as a defense to certain international tax overtures."[153] This is, however, not the case with the developing countries when it comes to the UN MTC and allocative principles subscribed to under it. In developing countries, the UN MTC was raised to the mantle of a hallowed object to be religiously pursued. Although in reality, a model should only be a model – a template, and not a quasi-convention in its own right setting out hard principles of allocation of taxing rights between states – and never perhaps the tax rates.[154] Although Jones believes that states "sign up to variations on the Model Treaty,"[155] in reality, there are only a few deviations – and hardly ever on allocative principles. Over time, the territoriality got ingrained into the psyche of developing nations as the gold standard on sharing of taxing rights on immovables, allowing the matter of allocation of fiscal rights off the negotiating table, into the oblivion. This facilitated elimination of almost all the alternatives from the debate surrounding international taxation, redirecting the entire focus to peripheral implementation matters. With costs of this legalized shift of resources from where those were most needed to where those constituted only surplus capital having already risen beyond affordable limits, it is just about time that the matter is resolved equitably.

4.4. Summation

Now, if all states on all types of incomes pursued territoriality in right earnest, there would not be any tax disputes arising amongst them. In fact, if the fiscal outputs were distributed among all states on the uniform principle of territoriality, much of the poverty in the developing countries and affluence in the developed ones would not probably have been visible anywhere in the world. Majorly, all this could have occurred due to cherry-picking of allocative principles on fiscal rights, triggering and whipping up reverse capital movement. All international economic disparity, in a crude sense, represents ill-gotten international fiscal surplus.

Section 5: Conclusion

The paper seminally brings into the spotlight the issue of reverse capital flows from the developing economies into developed immovables markets, distinguishes it from varied income types that are well-aligned with expected international capital flows, and dissects it against the selective territoriality in a historical context. There are five inter-related summations that can be garnered from the preceding debate. Firstly, the currently applicable international taxes regime is not founded on any one uniform principle of sharing of taxing rights between nation states. It is rather based on cherry-picking on behalf of those who had the requisite economic power levers to actually exercise the choices, and this is grounded in history. Secondly, once the cherry-picking choices were made, those possessed of the requisite power sinews took to obliquely modifying the norms of international business, movement of capital across borders, and the way it was to be regulated so as to optimize on the principle of territoriality – as delineated in section 3 at length. Thirdly, as also explained in section 2 and 3, howsoever liberalist it might ostensibly seem, in fact, the international tax system warrants a dissection from a realist perspective to interpret it in its true essentials. Fourthly, the selective territoriality on immovables, under no circumstances, justifies itself – in the particular wake of it having become a protective gear for money launderers and tax evaders of developing countries. Fifthly, if the UN were to be developing nations' main forte to protect their economic and fiscal rights, then the sooner they come out of the delusion the better, and learn to operate on a self-help basis to protect themselves in this anarchic world. It has been rightly argued that "the developed world by pitching up UN MTC as 'counter' to the OECD MTC practically monopolized the entire epistemological space for any independent alternative thinking by the developing countries."[156] In fact, the BOP problem for most developing countries is not a debt problem; it is primarily a tax problem.

It is obvious that once the requisite cognition has been attained, most developing nations would prefer to renegotiate their DTCs – particularly those with developed countries – thereby reversing selective territoriality underlying UN MTC Article 6 and its attended provisions. To make it palatable, tax on immovables could be aligned with the origin, source and earning of funds invested in acquisition of offshore immovables. Alternatively, the residence taxation rights could be associated with a more structured and transparent mechanism of bestowing "stakeholder citizenship." Another possibility could be to share taxing rights under Article 6 between developed and developing countries. At the international level, nation states could consider: debarring corporations and trusts from acquiring properties in jurisdictions other than those of their own registration and residence; establishing a global assets registry at the earliest; including immovables in the CRS transmission schema; and operationalizing spontaneous EOI to cover CBI/RBI programs, as all these measures could do a lot of good to the developing countries' fiscal systems and economic stability as well as the integrity of the international economic system. Currently, in many a situation, some of the developing nations could, in reality, be net lenders to some of their creditor developed nations—, and the UN MTC would have to garner a substantial amount of superior wisdom to correct that meta-historical wrong. It goes without saying that in order for the international cooperation frameworks to be sustainable over a longer period of time, those have to be fair and equitable.

Endnotes:

[1] Pakistan Prime Minister Imran Khan's Speech at the United Nations General Assembly on September 30, 2019, New York, United States.

[2] Article 6(1) of UN, *United Nations Model Double Taxation Convention between Developed and Developing Countries 2017* (New York, Department of Economic & Social Affairs, 2017).

[3] R. Rohatgi, *Basic International Taxation*, vol. I (Richmond, U.K,Richmond Law & Tax, 2005).

[4] In some situations, incomes derived sans a PE may be also taxed in the source state including: (i) income from a direct use of immovable property in hoteling or mining business; (ii) income of entertainers, sportsmen, and athletes; (iii) income in the form of dividends, royalties, interest, and fees for technical services per rates mutually agreed upon in double taxation conventions (DTCs); (iv) income attributable to insurance and reinsurance premia; & (v) income from services rendered should the providers' presence exceed 183 days. On the contrary, incomes from international traffic and capital gains (excluding gains from immovables and business property of a PE), despite there being a PE are not taxed in the source state.

[5] Muhammad Ashfaq Ahmed, "U.N. M.T.C. Article 8: Was the Source Rule Surrender a Blunder?," *Intertax,* vol. 48, No. 1 (2020).

[6] It will not be impertinent to mention that Easson has already used the developed-developing country framework to appraise the international taxes regime in a more general and broader sense. See, for further analysis A. Easson, "Do We Still Need Tax Treaties?," *Bulletin for International Taxation,* vol. 54 (2010).

[7] Muhammad Ashfaq Ahmed, "U.N. M.T.C. Article 5: The Predatory Ploy: A Neo-Marxist Mapping of the Permanent Establishment," *Manchester Journal of International Economic Law,* vol. 17, No. 2 (2020).

[8] Umut Özsu, "Grabbing Land Legally: A Marxist Analysis," *Leiden Journal of International Law,* vol. 32, No. 2 (2019). Available from https://dx.doi.org/DOI:10.1017/S0922156519000025.

[9] Article 4 ("Income from Immovable Property") of AC, *Model Convention for the Avoidance of Double Taxation between Member Countries and Other Countries Outside the Andean Sub-Region* (Lima, Peru, Commission of Andean Community, 2004).

[10] Article 13(1) of UN MTC.

[11] Article 13(4) and (5) of UN MTC.

[12] OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 - 2015 Final Report OECD/G20 Base Erosion and Profit Shifting Project* (Paris, OECD Publishing, 2015).

[13] Article 4 ("Income from Immovable Property") of AC MTC.

[14] Donald R. Whittaker, "An Examination of the O.E.C.D. And U.N. Model Tax Treaties: History, Provisions and Application to U.S. Foreign Policy," *North Carolina Journal of International Law and Commercial Regulation,* vol. 8, No. 1 (Winter 1982).

[15] UN.

[16] Whittaker, "An Examination of the O.E.C.D. And U.N. Model Tax Treaties".

[17] Danil V. Vinnitskiy, "History of Taxation of Incomes Derived from Immovable Property in Cross-Border Situations," *Russian Law: Theory and Practice,* vol. 2 (2016).

[18] For further expansion of the idea, see Ahmed, "U.N. M.T.C. Article 8: Was the Source Rule Surrender a Blunder?."

[19] K. Neumeyer, "Internationales Finanzrecht," *Zeitschrift für Internationales Recht* XXIV, No. Band (1914).

[20] E. Reimer, "Income from Immovable Property (Article 6 OECD Model Convention)," in *Source Versus Residence: Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives*, M. Lang *et al.*, eds.(New Delhi,Taxmann Publications, 2010), p. 3.

[21] Vinnitskiy, "History of Taxation of Incomes Derived from Immovable Property in Cross-Border Situations".

[22] The Covenant establishing the League of Nations was included in the Treaty of Versailles, signed on June 28, 1919.

[23] The League's highest ever membership at 58 was from September 28, 1934 till February 23, 1935, which included Argentina, Australia, Belgium, Bolivia, Great Britain, Canada, Chile, China, Columbia, Cuba, Czechoslovakia, Denmark, El Salvador, France, Greece, Guatemala, Haiti, Honduras, India, Italy, Liberia, the Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Iran, Peru, Poland, Portugal, Romania, Siam, South Africa, Spain, Sweden, Switzerland, Uruguay, Venezuela, Yugoslavia, Austria, Bulgaria, Finland, Luxembourg, Albania, Estonia, Latvia, Lithuania, Hungary, Ireland, Ethiopia, Dominican Republic, Mexico, Turkey, Iraq, Soviet Union, Afghanistan, and Ecuador. At this time, Costa Rica, Brazil, Japan and Germany had already left, whereas Egypt was yet to join the League. The League was eventually dissolved in 1946.

[24] Martin Hill, *The Economic and Financial Organization of the League of Nations: A Survey of Twenty-Five Years' Experience*, *International Law* (Carnegie Endowment for International Peace, 1946). Available from https://books.google.com.pk/books?id=3CtBAAAAIAAJ.

[25] Article 23(e) of the Covenant of the League of Nations.

[26] League of Nations, *International Financial Conference Brussels, 1920, vol. 1,* p. 3.

[27] League of Nations, *International Financial Conference Brussels, 1920, vol. 1,* p. 26.

[28] Yann Decorzant, "Internationalism in the Economic and Financial Organisation of the League of Nations," in *Internationalism Reconfigured: Transnational Ideas and Movements between the World Wars*, Daniel Laqua, ed. , vol. 34 (I.B.Tauris, 2011).

[29] Provisional Economic and Financial Committee - Report to the Council upon the Session held at Geneva, August-September, 1921 Communicated to the Assembly in Accordance with the Council's Resolution of September 19, 1921 (A.95.1921.II) P.6. See, for further details, Sunita Jogaranjan, "Stamp, Seligman and the Drafting of the 1923 Experts' Report on Double Taxation," *World Tax Journal,* vol. 5, No. 3 (2013).

[30] The economists which comprised the committee were Prof. Bruins, Commercial University, Rotterdam; Prof. Senator Einaudi, Turin University; Prof. Sligman, Columbia University, New York; & Sir Josiah Stamp, London University.

[31] The term "Acquision or Origin" in regard to "Immovables: Land and Houses" has been implied in the sense that since "earnings from land and houses -- that is from real estate or immovable property -- may be said to be so intimately bound up with the real estate itself as to render the place where the yield arises the overwhelming factor in the element of origin," and that the "individual landowner forms, in most cases, an economic part of the society where the land is situated; his economic interests are so closely interwoven with the land that it is there that his chief economic allegiance is due." See, for elaboration, League of Nations, *Report on Double Taxation* (Geneva, Economic & Financial Commission, 1923), p. 31.

[32] The term "Situs" in regard to "Immovables: Land and Houses" has been defined as the "land is physically located where its yield arises." See, for an extended debate on the concept, League of Nations, "Report on Double Taxation," p. 32.

[33] The term "Enforceability or legal status" in regard to "Immovables: Land and Houses" has been defined as, "The chief element in the legal status is the protection afforded by the title to the physical property," and that it "is obviously bound up directly with the property itself."See, for detailed deliberations, League of Nations, "Report on Double Taxation," p. 32.

[34] Contextually, the term "Domicile" has been equated with "permanent residence," implying individuals "who are permanently or habitually resident in a place." See, for an in-depth analysis, League of Nations, "Report on Double Taxation," p. 20.

[35] League of Nations, "Report on Double Taxation," p. 32.

[36] League of Nations, "Report on Double Taxation."

[37] Minutes of the First Meeting of the Sixth Session of the Financial Committee of the Provisional Economic and Financial Committee held at 11am on February 23, 1922, in Geneva - League of Nations Archives; Box R 333:E.F/FinanceVI/P.V.I: United Nations, Geneva - as cited by Sunita Jogaranjan, *Double Taxation and the League of Nations*, *Cambridge Tax Law Series* (Cambridge University Press, 2018).

[38] The states, in first category, were the Great Britain, France, and Belgium, and in the second, the Netherlands, Italy, and Switzerland.

[39] Sunita Jogaranjan, "The Drafting of the 1925 League of Nations Resolutions on Tax Evasion'," in *Studies in the History of Tax Law*, Peter Harris and Dominic de Cogan, eds., vol. 7 (Hart Publishing, 2015).

[40] League of Nations, *Double Taxation and Tax Evasion: Report and Resolutions Submitted by the Technical Experts to the Financial Committee of the League of Nations*, vol. 45 (Geneva, Publications of the League of Nations, 1925). Available from http://catalog.hathitrust.org/Record/001138020; http://hdl.handle.net/2027/mdp.39015075087786; http://hdl.handle.net/2027/coo.31924014004885.

[41] Jogaranjan, *Double Taxation and the League of Nations*.

[42] The Committee consisted of Salvador Oria, Argentina; M. Clavier, Belgium; Valdimir Valnicek, Czechoslovakia; M. Borduge, France; Herbert Dorn, Germany; Pasquale D'Aroma, Italy; Kengo Mori, Japan; J. Sinninghe Damsete, Netherlands; Stefan Salseri, Poland; Haus Blau, Switzerland; Thomas Adams, USA; and Frederico Feo, Venezuela.

[43] The Financial Committee Report to the Council on the Work of the Eighteenth Session, Geneva, June 4-8, 1925 - League of Nations Archives, C.335.1925.II - United Nations, Geneva.

[44] Article 2(1) of League of Nations, *Report and Resolutions Submitted by the Technical Experts on Double Taxation and Tax Evasion* (Geneva, 1927). Available from http://catalog.hathitrust.org/Record/001138077.

[45] Article 2(2) of League of Nations, *Report and Resolutions Submitted by the Technical Experts on Double Taxation and Tax Evasion* (Geneva, 1927).

[46] Vinnitskiy, "History of Taxation of Incomes Derived from Immovable Property in Cross-Border Situations".

[47] Ibid.

[48] Ibid.

[49] Ibid.

[50] League of Nations, *Convention for the Allocation of Business Income between States for the Purposes of Taxation* (Geneva, League of Nations, 1935).

[51] Vinnitskiy "History of Taxation of Incomes Derived from Immovable Property in Cross-Border Situations".

[52] League of Nations, *Model Bilateral Convention for the Prevention of the Double Taxation of Income* (Mexico, League of Nations, 1943).

[53] Vinnitskiy, "History of Taxation of Incomes Derived from Immovable Property in Cross-Border Situations".

[54] Ibid.

[55] Ibid.

[56] League of Nations, *Fiscal Committee: Report on the Work of the Tenth Session of the Committee* (London, League of Nations, 1946).

[57] League of Nations, "Fiscal Committee: Report on the Work of the Tenth Session of the Committee."

[58] League of Nations, *Fiscal Committee - London and Mexico Model Tax Conevtions Commentary and Text - C.88.M.88. 1946.A.Ii (Geneva, November, 1946)*, vol. C.88. M88, 1946.A.II vols., *Australian Digital Collections* (Sydney, University of Sydney, 1946). Available from http://adc.library.usyd.edu.au.

[59] League-of-Nations, *Model Bilateral Convention for the Prevention of the Double Taxation of Income and Property* (London, League of Nations, 1946).

[60] Whittaker, Whittaker, "An Examination of the O.E.C.D. And U.N. Model Tax Treaties".

[61] Ahmed, "U.N. M.T.C. Article 8: Was the Source Rule Surrender a Blunder?."

[62] Vinnitskiy, "History of Taxation of Incomes Derived from Immovable Property in Cross-Border Situations".

[63] Ahmed, "U.N. M.T.C. Article 8: Was the Source Rule Surrender a Blunder?."

[64] Vinnitskiy, "History of Taxation of Incomes Derived from Immovable Property in Cross-Border Situations".

[65] The "Ad-Hoc Group of Experts on Tax Treaties between Developed and Developing Countries" was established under ECOSOC Resolution 1273 (XVIII) adopted on August 4, 1967.

[66] Article 6(2) of UN MTC.

[67] Article 6(3) of UN MTC.

[68] Article 6(4) of UN MTC.

[69] Article 6(2) of UN MTC.

[70] Dhruv Sanghavi, "The Interaction of Articles 6, 7 and 21 of the 2014 OECD Model Tax Convention: A Historical Analysis," *Intertax,* vol. 44, No. 8/9 (2016).

[71] Bin Yang and Chun Ping Song, "A Comparative Study of the OECD Model, UN Model and China's Treaties with Respect to Rights to Tax Income and Capital", *eJournal of Tax Research,* vol. 9, No. 3 (2011).

[72] Ibid.

[73] Ibid.

[74] See, for further details, F.S. Scandone and B.E. Pappalardo, "The Interaction between Business Profits and Income from Immovable Property under Tax Treaties: Is It All About Definitions?," *Intertax,* vol. 37, No. 4 (2009), Irene Burgers and Irma Mosquera, "Corporate Taxation and BEPS: A Fair Slice for Developing Countries?," *Erasmus Law Review,* vol. 1, (August 2017), Stefano Simontacchi, *Taxation of Capital Gains under the OECD Model Convention: With Special Regard to Immovable Property* (Amsterdam, Kluwer Law International, 2007). Available from https://books.google.com.pk/books?id=wlkX4uXRtZkC.

[75] Michael Lennard, "The U.N Model Convention as Compared with the O.E.C.D Model Tax Convention - Current Points of Difference and Recent Developments," *Asia-Pacific Tax Bulletin* (January 2009).

[76] See, for further analysis Xin Xu, Ahmed El-Ashram, and Judith Gold, *Too Much of a Good Thing? Prudent Management of Inflows under Economic Citizenship Programs,* IMF Working Paper (Washington DC, 2015), David Röthler, and Karsten Wenzlaff, *Crowdfunding Schemes in Europe* (Barcelona, European Expert Network on Culture, 2011), Ayelet Shachar, and Rainer Bauböck, eds., *Should Citizenship Be for Sale?* (Fiesole, European University Institute - Robert Schuman Centre for Advanced Studies, European Union Democracy Observatory on Citizenship, 2014), Madeleine Sumption, and Kate Hooper, *Selling Visas and Citizenship: Policy Questions from the Global Boom in Investor Immigration* (Washington DC, Migration Policy Institute, 2014), International Organization of Securities Commissions, *Anti-Money Laundering Guidance for Collective Investment Schemes* (Madrid, TC-IOSCO, 2005), Jelena Džankić, *Investment-Based Citizenship and Residence Programmes in the EU*, EUI Working Papers (Fiesole, European University Institute - Robert Schuman Centre for Advanced Studies, 2015), Giorgio Beretta, "Citizenship and Tax," *World Tax Journal,* vol. 11, No. 2 (2019).

[77] Allison Christians, "Buying In: Residence and Citizenship by Investment," *Saint Louis University Law Journal,* vol. 62, No. 51 (2017).

[78] Thomas Rixen, "Tax Competiton and Inequality: The Case of Global Tax Governance," *Global Governance,* vol. 17 (2011).

[79] Raul Magni-Berton, "Citizenship for Those Who Invest into the Future of the State Is Not Wrong, the Price Is the Problem," in *Should Citizenship Be for Sale?*, A. Shachar and R. Bauock, eds. (Florence. European University Institute, 2014).

[80] Džankić, *Investment-Based Citizenship and Residence Programmes in the EU.*

[81] Rainer Baubock, "Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting," *Frodham Law Review,* vol. 75, No. 5 (2007).

[82] Article 1 of the Hague Convention entitled "Certain Questions relating to the Conflict of Nationality Laws."

[83] Beretta, "Citizenship and Tax".

[84] Ibid.

[85] Džankić, *Investment-Based Citizenship and Residence Programmes in the EU*.

[86] Christians, "Buying In: Residence and Citizenship by Investment".

[87] OECD. See https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/residence-citizenship-by-investment/.

[88] Christians, "Buying In: Residence and Citizenship by Investment".

[89] Ibid.

[90] UN MTC Article 4 stipulates that when an individual is treated as tax resident under the domestic laws of each state, residence is to be determined on the basis of the tie-breaker rule - beginning with the individual's home and his economic connections - eventually ending with nationality.

[91] Beretta, "Citizenship and Tax".

[92] Ibid.

[93] Andres Knobel, and Frederik Heitmüller, *Citizenship and Residency by Investment Schemes: Potential to Avoid the Common Reporting Standard for Automatic Exchange of Information* (London, Tax Justice Network, 2018).

[94] The OECD has identified and appraised about 100 CBI/RBI schemes by Common Reporting Standard (CRS)-committed jurisdictions, as a result of which the schemes that potentially pose a high-risk to the integrity of CRS are (i) **Antigua and Barbuda**: (a) Antigua and Barbuda Citizenship by Investment, and (b) Permanent Residence Certificate; (ii) **Bahamas:** Bahamas Economic Permanent Residency; (iii) **Bahrain:** Bahrain Residence by Investment; (iv) **Barbados:** Special Entry and Residence Permit; (v) **Cyprus:** (a) Citizenship by Investment, (b) Scheme for Naturalization of Investors in Cyprus by Exception; (vi) **Dominica**: Citizenship by Investment; (vii) **Grenada:** Grenada Citizenship by Investment; (viii) **Malaysia:** Malaysia My Second Home Program; (ix) **Malta:** (a) Malta Residence and Visa Program, and (b) Malta Residence and Visa Programme; (x) **Qatar:** Residence Visa for Real Estate Owner; (xi) **Saint Kitts and Nevis:** Citizenship by Investment; (xii) **Saint Lucia**: Citizenship by Investment Saint Lucia; (xiii) **Seychelles:** Type 1 Investor Visa; (xiv) **Turks and Caicos Islands**: (a) Permanent Residence Certificate via Undertaking and Investment in a Home, (b) Permanent Residence Certificate via Investment in a Designated Public Sector Project; (c) Permanent Residence Certificate via Investment in a Home or Business; (xv) **United Arab Emirates:** UAE Residence by Investment; (xvi) **Vanuatu:** (a) Development Support Program, (b) Self-Funded Visa, (c) Land-Owner Visa, and (d) Investor Visa.

[95] OECD. See https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/residence-citizenship-by-investment/.

[96] Christians, "Buying In: Residence and Citizenship by Investment".

[97] The best example of such tax-neutral CBI program is the "Dutch Investor Visa for High Net Worth Individuals," which offers permanent residence in return for investment of $ 1,250,000, but sans any tax relief as the Dutch individual top marginal tax rates runs above 50 percent.

[98] Christians, "Buying In: Residence and Citizenship by Investment".

[99] Beretta, "Citizenship and Tax".

[100] Knobel, and Heitmüller, *Citizenship and Residency by Investment Schemes*.

[101] OECD. See https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/residence-citizenship-by-investment/.

[102] Beretta, "Citizenship and Tax".

[103] Knobel, and Heitmüller, *Citizenship and Residency by Investment Schemes.*.

[104] League of Nations, "Report on Double Taxation."

[105] Knobel, and Heitmüller, *Citizenship and Residency by Investment Schemes.*.

[106] OECD, *Harmful Tax Competition: An Emerging Global Issue* (Paris, OECD Publishing, 1998), p. 23.

[107] James S. Henry, "The Bizarre Economics of Tax Havens and Pirate Banking", TED Talk. Available from https://www.youtube.com/watch?v=znYA0yIQMq0, 2013.

[108] Jane G. Gravelle, "Tax Havens: International Tax Avoidance and Evasion", *Congressional Research Service* (2015).

[109] Nicholas Shaxson, "A Tale of Two Londons," *Vanity Fair*, March 13, 2013.

[110] Richard Murphy, *Tax Haven Ownership of Uk Property Might Cost £2 Billion in Tax Avoidance* (London, Tax Research UK, 2014).

[111] Tax Justice Network. See https://www.taxjustice.net/2014/08/01/tax-haven-buyers-set-property-alarm-london/.

[112] DW Documentary, "How the Richer Get Richer – Money in the World Economy". Available from https://www.youtube.com/watch?v=t6m49vNjEGs (Watched: March 25, 2020).

[113] Ibid.

[114] Most famous of UK's tax havens styled as Crown Dependencies are (i) Guernsey; (ii) Jersey; (iii) Isle of Man; and those styled as Overseas Territories include (i) Bermuda; (ii) Cayman Islands; (iii) Turks & Caicos Islands; (iv) British Virgin Islands; (v) Anguilla; (vi) Montserrat; (vii) Falkland Islands; (viii) South Georgia & South Sandwich Islands; (ix) British Indian Ocean Territory; and (x) Peticairn, Henderson, & Oeno Islands.

[115] Gravelle, "Tax Havens: International Tax Avoidance and Evasion".

[116] Ahmed, "U.N. M.T.C. Article 5: The Predatory Ploy: A Neo-Marxist Mapping of the Permanent Establishment."

[117] With the advantage of hindsight, it is no more a hypothetical scenario, this is how actually capital travelled from the developing to the developed countries.

[118] Ahmad Khan, *Cross Border Transactions and Tax Treaties Theory and Practice* (Singapore, Petrosin, 2000), p. 142.

[119] Ibid., p. 143.

[120] See, for an in depth analysis Alessandro Fiocco, eds., "The Beneficial Ownership in OECD's Tax Treaties," *Focus* (2018),

Andres Knobel, "Drilling Down to the Real Owners – Part 1: "More Than 25% of Ownership" & "Unidentified" Beneficial Ownership: Amendments Needed in FATF's Recommendations and in EU's AML Directive," Tax Justice Network (2016). Available from http://www.taxjustice.net (accessed March 28, 2020), Craig Elliffee, "The Interpretation and Meaning of "Beneficial Owner" in New Zealand," *British Tax Review,* vol. 49, No. 3 (2009), Alexander V. Demin, and Alexey V. Nikolaev, "The Beneficial Owner Concept in the Context of BEPS: Problems and Prospects," *Financial Law Review,* vol. 13, No. 1 (2019), Catherine Anne Brown, "Tax, Trusts and Beneficial Ownership: Perils for the Unwary Practitioner," *Estates, Trusts & Pensions Journal,* vol. 23, No. 9 (2004).

[121] Andrew Rice, "Stash Pad," *New York*, June 27, 2014.

[122] Brown, "Tax, Trusts and Beneficial Ownership".

[123] Murphy, *Tax Haven Ownership of Uk Property Might Cost £2 Billion in Tax Avoidance.*

[124] Demin, and Nikolaev, "The Beneficial Owner Concept in the Context of BEPS.

[125] Jogaranjan, *Double Taxation and the League of Nations*.

[126] Noam Noked, "Tax Evasion and Incomplete Tax Transparency," *Laws,* vol. 7, No. 31 (2018). Available from https://dx.doi.org/doi:10.3390/laws7030031.

[127] Noked, "Tax Evasion and Incomplete Tax Transparency".

[128] Lisa De Simone, Rebecca Lester, and Kevin Markle, "Transparency and Tax Evasion: Evidence from the Foreign Account Tax Compliance Act (FATCA)," *Journal of Accounting Research,* vol. 58, No. 1 (2020).

[129] See, for instance, Sergio Andre Rocha, "Should Developing Countries Include Article 7 in Their Tax Treaties?," *Bulletin for Interantional Taxation*, IBFD (2017), Ahmed, "U.N. M.T.C. Article 8: Was the Source Rule Surrender a Blunder?.", Katrin McGauran, *Should the Netherlands Sign Tax Treaties with Developing Countries?* (Amsterdam, Centre for Research on Multinational Corporations, 2013), Tax Justice Network, *Double Taxation Agreements: Gain or Loss to Tanzania?* (Chasham, Tax Justice Network, 2016), Veronika Daurer, and Richard Krever, "Choosing between the UN and OECD Tax Policy Models: An African Case Study," *African Journal of International and Comparative Law,* vol. 1, No. 21 (2014). Available from https://dx.doi.org/10.3366/ajicl.2014.0077, I.J. Mosquera Valderrama, "Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism," *World Tax Journal,* vol. 7, No. 3 (2015), Peter D. Byrne, "Developing Countries, Tax Treaties and the United Nations Model Tax Convention," *I.L.S.A. Journal of International and Comparative Law,* vol. 2, No. 695 (1996), Martin Hearson, *Measuring Tax Treaty Negotiations Outcomes: The Actionaid Tax Treaties Dataset*, Working Paper 47(Brighton, Institute for Development Studies, ICTD, 2016).

[130] OECD, *Commentary on the Model Tax Convention on Income & on Capital* (Paris,OECD Publishing, 2017), p. 170.

[131] Khan, *Cross Border Transactions and Tax Treaties Theory and Practice,* p. 140.

[132] Reimer, in *Source Versus Residence: Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives*, p. 3.

[133] For further evidence that the situs rule was rooted in antiquity, see Il Garelli, *Diritto Internazionale Tributario* (Torino, Roux Frassati Co., 1899), Campos M. Torres, "Elementos De Derecho Internacional Privado," *Librería de Fernando Fe* I (La tercera edición) (1906).

[134] Vinnitskiy, "History of Taxation of Incomes Derived from Immovable Property in Cross-Border Situations".

[135] Rice "Stash Pad".

[136] Simone, Lester, and Markle, "Transparency and Tax Evasion".

[137] UN.

[138] Khan, *Cross Border Transactions and Tax Treaties Theory and Practice.*

[139] R.J. Vann, "A Model Tax Treaty for the Asian-Pacific Region? (Part I)," *Bulletin for International Fiscal Documentation,* vol. 45, No. 3 (1991), R.J. Vann, "A Model Tax Treaty for the Asian-Pacific Region? (Part II)," *Bulletin for International Fiscal Documentation,* vol. 45, No. 4 (1991).

[140] Vann, "A Model Tax Treaty for the Asian-Pacific Region? (Part I)", Vann, "A Model Tax Treaty for the Asian-Pacific Region? (Part II)."

[141] Reuven S Avi-Yonah, "Structure of International Taxation: A Proposal for Simplification," *Texas Law Review* vol. 74 (1995).

[142] A. Easson, "Do We Still Need Tax Treaties?", *Bulletin for International Taxation*.

[143] Ibid, p. 625.

[144] Joanna Wheeler, *The Missing Keystone of Income Tax Treaties*, vol. 23, Doctoral Series (Amsterdam, IBFD, 2012).

[145] S. Wilkie, "Are (These) Tax Treaties Necessary?," in *Essays on Tax Treaties: A Tribute to David A. Ward*, Guglielmo Maisto, ed. (Amsterdam, IBFD & CTF, 2012).

[146] Will Fitzgibbon, "Treaty to 'Dodge Kenyan Tax' Deemed Unconstitutional," *ICIJ* , March 18, 2019.

[147] Victor Amadala, "Kenya-Mauritius Double Tax Avoidance Void, High Court Rules," *Tax Justice* , March 19, 2019.

[148] F.M. Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (Boston, Oxford University Press, 2007).

[149] Muhammad Ashfaq Ahmed, "Pakistan's B.O.P Blues: Demons in the Debit Side - an Elitistic Analysis of the Outward Remittance Regime - Bringing the Tax Pincer Back In," *Journal of Taxation and Regulatory Framework* vol. 3, No. 1 (2020).

[150] Markus Meinzer, "Automatic Exchange of Information as the New Global Standard: The End of (Offshore Tax Evasion) History?," in *Automatic Exchange of Information and Prospects of Turkish-German Cooperation*, Leyla Ates and Joachim English, eds. (Isltanbul, Onikilehva, 2018).

[151] Meinzer, "Automatic Exchange of Information as the New Global Standard: The End of (Offshore Tax Evasion) History?".

[152] Ahmed, "U.N. M.T.C. Article 5: The Predatory Ploy: A Neo-Marxist Mapping of the Permanent Establishment."

[153] Diane Ring, *What's at Stake in the Sovereignty Debate?* International Tax and the Nation-State Legal Studies Research Paper Series (Boston, Boston College Law Review, 2008).

[154] Rohatgi, *Basic International Taxation*.

[155] J.F. Avery Jones, "The David R. Tillinghast Lecture: Are Tax Treaties Necessary?," *Tax Law Review,* vol. 53 (1999).

[156] Ahmed, "U.N. M.T.C. Article 5: The Predatory Ploy: A Neo-Marxist Mapping of the Permanent Establishment."

This brief is part of the South Centre's policy brief series focusing on tax policies and the experiences in international tax cooperation of developing countries.

Efforts to reform international cooperation in tax matters are exhibiting a distinct acceleration. The direction of change must recognize and incorporate innovations in developing country policies and approaches, otherwise the outcomes will obstruct practical paths to development.

The policy brief series is intended as a tool to assist in further dialogue on needed reforms.

***** The views contained in the policy briefs are personal to the authors and do not represent the institutional views of the South Centre or its Member States.**

Previous South Centre Tax Cooperation Policy Briefs

No. 9, September 2019— Gender, Tax Reform and Taxation Cooperation Issues: Navigating Equity and Efficiency under Policy Constraints by Mariama Williams

No. 10, November 2019— Addressing Developing Countries' Tax Challenges of the Digitalization of the Economy by Monica Victor

No. 11, February 2020—The Role of South-South Cooperation in Combatting Illicit Financial Flows by Manuel F Montes

No. 12, September 2020—Base Erosion and Profit Shifting in the Extractive Industries by Danish and Daniel Uribe

No. 13, February 2021—Making the UN Tax Committee more effective for developing countries by Abdul Muheet Chowdhary

No. 14, June 2021—The Tax Sovereignty Principle and Its Peaceful Coexistence with Article 12B of the UN Model Tax Convention by Kuldeep Sharma, ADIT (CIOT, UK)

No. 15, June 2021—Conceptualizing a UN Multilateral Instrument by Radhakishan Rawal

No. 16, July 2021— Article 12B – A tax treaty solution by the UN Tax Committee for taxing digital incomes by Rajat Bansal

No. 17, July 2021— An Albatross Around the Neck of Developing Nations – MFN Clause in Tax Treaties by Deepak Kapoor, IRS

No. 18, September 2021— Combatting Tax Treaty Abuse: Tools available under the BEPS Multilateral Instrument by Kuldeep Sharma, ADIT (CIOT,UK)

No. 19, October 2021— Developing Country Demands for an Equitable Digital Tax Solution by Abdul Muheet Chowdhary

No. 20, October 2021— Making the UN Tax Committee's Subcommittees More Effective for Developing Countries by Abdul Muheet Chowdhary, Sebastien Babou Diasso, and Aaditri Solankii

No. 21, November 2021— Streamlining the Architecture of International Tax through a UN Framework Convention on Tax Cooperation by Abdul Muheet Chowdhary and Sol Picciotto

No. 22, 12 January 2022 — Global Minimum Corporate Tax: Interaction of Income Inclusion Rule with Controlled Foreign Corporation and Tax-sparing Provisions by Kuldeep Sharma, ADIT (CIOT,UK), FTI (Australia), Insolvency Professional (IBBI)

No. 23, 11 February 2022 — Global Minimum Tax Rate: Detached from Developing Country Realities by Sebastien Babou Diasso

No. 24, 11 February 2022 — A Global Asset Registry to track hidden fortunes and for asset recovery by Ricardo Martner

SOUTH CENTRE

The South Centre is the intergovernmental organization of developing countries that helps developing countries to combine their efforts and expertise to promote their common interests in the international arena. The South Centre was established by an Intergovernmental Agreement which came into force on 31 July 1995. Its headquarters is in Geneva, Switzerland.

The South Centre
International Environment House 2
Chemin de Balexert 7-9
PO Box 228, 1211 Geneva 19
Switzerland
Tel.: +41 (0)22 791 8050
south@southcentre.int
https://www.southcentre.int

Follow the South Centre's Twitter: South_Centre